LIBRARY
SUPREME COURT, U. S.

Office-Supreme Court, U.S.
FILED
JAN 24 1964
JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

October Term, 1963
No. 682

AMERICAN PIPE AND CONSTRUCTION COMPANY, a California Corporation, ROBERT V. EDWARDS, ELLIOTT BRAINARD, UNITED CONCRETE PIPE CORP., a California Corporation, LLOYD EARL, RICHARD I. YOUNG, and GEORGE L. CURTIS,

Petitioners,

vs.

THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF CALIFORNIA, CENTRAL DIVISION, THE HONORABLE PEIRSON M. HALL, THE HONORABLE LEON R. YANKWICH, Judges of the United States District Court for the Southern District of California, Central Division, BATRIS W. PEROVICH, NORTHWEST PIPE LININGS, a California Corporation, INPLACE LININGS, INC., a California Corporation,

Respondents.

REPLY OF PETITIONERS.

FRANK D. MacDOWELL,
WILLIAM McD. MILLER,
HILL, FARRER & BURRILL,
JOHN J. COURTNEY,
411 West Fifth Street,
Los Angeles, California,
Attorneys for Petitioners American Pipe and Construction Company, Robert V. Edwards and Elliott Brainard.

J. O. VON KALINOWSKI,
JOHN J. HANSON,
BERNARD E. [illegible]COB,
GIBSON, DUNN & CRUTCHER,
634 South Spring Street,
Los Angeles 14, California,
Attorneys for Petitioners United Concrete Pipe Corp. Lloyd Earl, Richard I. Young and George Curtis.

Parker & Son, Inc., Law Printers, Los Angeles, Phone MA. 6-9171.

SUBJECT INDEX

	Page
Grand jury proceedings	2
Conclusion	4
Appendix. Pertinent portions of the transcript	App. p. 1

TABLE OF AUTHORITY CITED

Statute

United States Constitution, Fifth Amendment	4

IN THE

Supreme Court of the United States

October Term, 1963
No. 682

AMERICAN PIPE AND CONSTRUCTION COMPANY, a California Corporation, ROBERT V. EDWARDS, ELLIOTT BRAINARD, UNITED CONCRETE PIPE CORP., a California Corporation, LLOYD EARL, RICHARD I. YOUNG, and GEORGE L. CURTIS,

Petitioners,

vs.

THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF CALIFORNIA, CENTRAL DIVISION, THE HONORABLE PEIRSON M. HALL, THE HONORABLE LEON R. YANKWICH, Judges of the United States District Court for the Southern District of California, Central Division, BATRIS W. PEROVICH, NORTHWEST PIPE LININGS, a California Corporation, INPLACE LININGS, INC., a California Corporation,

Respondents.

REPLY OF PETITIONERS.

To the Chief Justice of the United States and the Associate Justices of the Supreme Court of the United States:

Pursuant to the practice of this Court, Petitioners will not reply point by point to the contentions of Respondents. Petitioners will merely bring to the attention of this Court certain facts which serve as a further showing that the commencement of criminal proceedings against Petitioners is an immediate and overwhelming threat. Accordingly, since Respondents themselves admit that it is "quite true" that Respondents' pending civil antitrust actions cover the same matters which

form the basis for the pending Grand Jury investigation (Answer to Petition, p. 9), positions which Petitioners are compelled to take in these civil antitrust actions must trammel Petitioners in the related criminal proceedings.

Grand Jury Proceedings.

A special Grand Jury, now in its sixteenth month, continues its investigation into the concrete and coated steel pipe industries in the western United States. The corporate Petitioners are members of that industry, and the individual Petitioners are key officers of the corporate Petitioners. Caught between the Grand Jury investigation and the private civil antitrust actions being pushed by Respondents, Petitioners have sought in several ways to be assured of a fair and orderly opportunity to defend themselves. Before this Court now, the individual Petitioners seek such an opportunity on the basis of the guarantee of the Bill of Rights against involuntary self-incrimination[1]; in the circumstances, all Petitioners have also turned to principles of due process to assure them this opportunity. These two distinct claims raise Constitutional questions of importance which this Court should consider.

Petitioners have also sought such assurance by insisting upon their right to expeditiousness on the part of the Government in bringing criminal proceedings. More particularly, they have urged that the special Grand Jury, impaneled for the purpose of this investigation, now has full information on which to act and that delay on its part, in returning either indict-

[1]Nowhere have the corporate Petitioners herein laid claim to a privilege against self-incrimination for corporate matters as such. The repeated (Answer to Petition, pages 2, 7, 16) assertions of Respondents to the contrary are in error.

ments or no-bills, constitutes a serious abuse of its inquisitorial powers. The various steps taken by Petitioner and others in respect to the Grand Jury have been set out in the briefs filed in this Court by Petitioners,[2] and by Respondents.[3] The most recent result of Petitioners' efforts was a hearing on Monday, December 16, 1963 before the Honorable Peirson M. Hall, Chief Judge of the United States District Court for the Southern District of California. Petitioners believe that certain statements made at this hearing so clearly show the reality of the danger confronting them that they have set forth at length, as an Appendix hereto, portions of the transcript of that hearing. These portions of the transcript show, by the candid admission of counsel for the Antitrust Division of the Department of Justice, the following:

1. The investigation of the concrete and coated steel pipe industry has been extremely comprehensive and extensive, the Grand Jury having heard more than sixty witnesses and having examined "27 file drawers full of documents."

2. Except for a small number of minor witnesses testifying solely as to the involvement of interstate commerce, the investigation by the Grand Jury was completed at the time of the hearing.

3. Subject to review in Washington, the Antitrust Division of the Justice Department is prepared to recommend that the Grand Jury return not "just one," but "several," indictments arising out of the investigation.

---

[2]Pages 7-8.
[3]Page 5.

4. Final action by the Grand Jury and the return of indictments should be completed by the end of February.

Petitioners submit that these statements made in open court by responsible representatives of the United States underline the high probability and extreme imminence of criminal prosecution. By the time that this Court acts on this Petition for a Writ of Certiorari, or shortly thereafter, it is extremely likely that indictments shall have been returned.

Conclusion.

The issues here presented to the Court arise from the *near certainty* felt by these Petitioners that their rights as criminal defendants may be compromised through their unwilling involvement *at this time* with Respondents' claims for monetary damages. The harm to Petitioners may well be irreparable; Respondents have never shown that they will be damaged at all by the limited *delay* in discovery proceedings sought by Petitioners. Instead, Respondents have been absolute in their demand that discovery proceedings go ahead in total disregard[4] of the threat to Petitioners of directly

[4]Respondents make much of the possible immunity from criminal prosecution available to two out of the five of the individual Petitioners. Respondents, however, have never offered to limit the taking of depositions to those of the individual Petitioners who may claim such immunity. But more than this, Respondents ignore the claims of all Petitioners to relief arising out of considerations of due process. Instead, Respondents offer only a dubious assertion as to the scope of the immunity and a flippant dismissal of the vexed problem of the protection accorded by the Fifth Amendment against self-incrimination under *state* law (Answer to Petition, pages 9-10).

related criminal proceedings. The result is that Respondents may gain wholly improper advantages by reason of the pending prosecution. The dangers confronting Petitioners are all too real; their contention that the Constitution accords them some relief from these dangers demands full consideration by this Court.

Respectfully submitted,

FRANK D. MacDOWELL,
WILLIAM McD. MILLER,
HILL, FARRER & BURRILL,
JOHN J. COURTNEY,
411 West Fifth Street,
Los Angeles, California,
Attorneys for Petitioners American Pipe and Construction Company, Robert V. Edwards and Elliott Brainard.

J. O. VON KALINOWSKI,
JOHN J. HANSON,
BERNARD E. JACOB,
GIBSON, DUNN & CRUTCHER,
634 South Spring Street,
Los Angeles 14, California,
Attorneys for Petitioners United Concrete Pipe Corp. Lloyd Earl, Richard I. Young and George Curtis.

APPENDIX.

The following are portions of the transcript, being pages 30-35 and 37-39 thereof, of the hearing before the Honorable Peirson M. Hall, Chief Judge of the United States District Court, Southern District of California, Central Division, held at Los Angeles, California on Monday, December 10, 1963 in the Matter of Investigation of the Concrete and Coated Steel Pipe Industries by the Grand Jury (Special) impaneled October 4, 1962. Mr. Whitehouse, Foreman (United States District Court, Southern District of California, Central Division, Misc. 941):

THE COURT: Mr. Disney [Attorney for the Justice Department], you are on some kind of time schedule, I suppose. What is your time schedule now? When do you anticipate you will conclude this matter before this grand jury?

MR. DISNEY: If your Honor please, our time schedule calls for us to submit to our head office in Washington, which scrutinizes all antitrust indictments, the matters or the various indictments which we hope to have this grand jury return by the end of January.

Now this does not involve just one [indictment] but it involves several [indictments], sir, and I can state that so far as our office is concerned—I don't know whether I should say it or not—but that is the time schedule.

THE COURT: The thing that I am concerned with is when will you conclude the matter with the grand jury? By the middle of February?

MR. DISNEY: If your Honor please, I have no reluctance to accepting an order that you—

THE COURT: I am not suggesting any order, and I will say candidly to counsel that I am not going to discharge the grand jury because the grand jury has before it other matters with which these people are not concerned, and I am not thus going to frustrate the prosecution of the criminal laws involving other crimes by yielding to the requests or demands of one group of people.

MR. DISNEY: I would like to have to the end of February, which would give our Washington office the one month in which to analyze and study this.

According to our procedure I do not have the authority that Mr. Whelan has; we must prepare an extensive factual memorandum, we then send forward our proposed indictments, our theories of law and the factual memorandum.

In Washington they exercise their judgment as to whether our theories are correct and as to whether our evidence sustains the indictments which we ask permission to recommend to the grand jury, and since all of our matters apply to large defendants who can be expected to appeal to the Supreme Court or to the Court of Appeals in a criminal case, frequently they have to clear them with the Solicitor General's office too, so I would say it would be the end of February. My office will be finished by the end of January.

MR. MILLER [Counsel for American Pipe and Construction Co.]: Your Honor please, may I be heard? My name is William Miller of Hill, Farrer & Burrill.

THE COURT: Yes.

MR. MILLER: With respect to Mr. Disney's remarks concerning a careful investigation, we are en-

tirely in agreement with that. We urge that the proper function of the grand jury is to act as an inquisitorial body, to hear evidence as to whether a crime has been committed, and if there is probability that certain persons did it, and that is all. We feel that it is improper that a grand jury be used as an evidence collecting device. We feel that the Federal Bureau of Investigation is available to the Department of Justice or the United States Attorney, or whoever else needs it in the Government, to collect the evidence and that they should have the evidence before they bring the matter to the grand jury.

This matter has been pending before this grand jury for well over a year, which is six months beyond the term that apparently has been determined as the policy matter in the order that your Honor mentioned.

Insofar as the delay because of recommendations as to the internal policy of the Antitrust Division is concerned, in this very proceeding on September 17th the Antitrust Division filed an affidavit of Barbara J. Svedberg which set forth this same identical procedure, that a recommendation had to go to Washington together with the indictment, which is considered by the Antitrust Division, that it takes them about a month to consider it, and on the October 17th hearing again an affidavit was filed by Barbara J. Svedberg in this proceeding in which she states under oath that since September 17, 1963 she has pursued the investigation with continued diligence with the aid of Donald J. Fallon, an attorney recently assigned to assist with the investigation, and that she has forwarded to Washington certain recommendations with respect to some matters and is preparing to forward further recommendations on related matters.

Now apparently according to the affidavit of this person under oath recommendations were forwarded to Washington as early as October 17, 1963, which is almost two months ago, and yet their grand jury has failed to indict one single person.

These people have been under the threat of indictment for over a year. We insist that people who are target defendants for indictment have the same constitutional rights to a speedy trial and a speedy determination of their rights as a person who is actually on trial. We think that the processes of the grand jury has been abused in this instance and that the rights of the target defendants under the constitution have been abused.

That is the reason these motions were made, your Honor.

THE COURT: Would you have anything more to present to him, Mr. Hanson, than has already been presented?

MR. HANSON [Counsel for United Concrete Pipe Corp.]: No, sir, except to point out that since October 14th, with respect to the four companies that are represented by counsel here, there have been no further subpoenas, they have questioned no more individuals, they have been in each of our organizations, they start with the lowest level person who has any knowledge and they work up to the top, and leaving one or two individuals who they do not call, and sometimes they call them and do not use them, as in the case of Mr. Earl. We are just pointing out that since October 14th there has been no evidence from our point of view for any further need of information by witnesses or documents.

THE COURT: You do not anticipate producing any further witnesses before the grand jury?

MR. DISNEY: If your Honor please, we may have one or two or maybe a number of small witnesses for the purpose of interstate commerce, but I don't think there will be many, they won't be numerous, and I do not know what is planned there. I would say that this would be a matter for discussion with your Honor in chambers.

THE COURT: By the way, I will not interview Mr. Whitehouse [foreman of the grand jury] in camera about what is going on in the grand jury room or what the attitude of the grand jury is because nobody can be present when they vote and nobody can know how they vote, so I think it would be highly improper for me or any other judge to inquire of Mr. Whitehouse how the grand jury stood on this matter or whether or not they desired to be discharged.

MR. DISNEY: If your Honor please, on the first point I don't want to be misunderstood. I did not intend to suggest that you inquire of Mr. Whitehouse as to the attitude of the grand jury on this, which I believe also would be improper, what I did intend to suggest was that you might want to inquire of him whether he thought the attorneys for the department were fumbling or whether the case was complicated, whether the time consumed seemed well spent, and things of that kind.

THE COURT: Let me ask you some questions without disclosing anything that went on before the grand jury by way of testimony. How many witnesses did you present?

MR. DISNEY: I think—do you know how many witnesses were presented, Miss Svedberg [Counsel for the Justice Department]?

MISS SVEDBERG: Over 60.

THE COURT: Over 60?

MR. DISNEY: That is right.

THE COURT: And documents?

MR. DISNEY: How many documents did we receive?

MISS SVEDBERG: Your Honor, we have approximately 27 file drawers full of documents which it takes considerable time to examine, and this is a very complicated industry.

* * * *

THE COURT: I would like to say, however, I do not expect to use the sanctions of the court but I do believe that by the order which the court has signed here of September 16th, indicating that these matters should be concluded with dispatch, that the Antitrust Division here and in Washington should proceed as promptly as possible to the conclusion of this matter.

By the way, was this the case where Judge Yankwich refused to suppress some subpoenas and I followed his ruling?

MR. MILLER: Yes, your Honor.

MR. HANSON: Yes, your Honor. That is the case.

THE COURT: I can see the dilemma of defendants' counsel in connection with these matters where they have private antitrust suits pending.

I will state to counsel now that if upon notice you wish to renew that motion before me I will give it reconsideration.

MR. HANSON: Your Honor, as you may or may not know, we went to the Ninth Circuit on that and the Ninth Circuit did not reverse you and we now have gone to the Supreme Court and Justice Douglas granted a stay pending filing of a petition for certiorari, so that matter is now before the Supreme Court.

THE COURT: Well, it is stayed a little while then.

MR. HAMPTON [Counsel for ~~Martin~~ Marietta Corporation]: Your Honor, in that connection, may I say this, because it is a very pertinent subject overall to antitrust cases, but I do think it will come before your Honor as the Chief Judge, the possible composition of these discovery problems growing out of these cases, and it may be that your Honor will want to give further consideration to this problem.

THE COURT: The only reason this matter got before me is because I am calling all of Judge Yankwich's matters during his illness. If it is before some other judge—is that a low number case? Is that the first case filed?

MR. HAMPTON: Yes.

THE COURT: Does he have all of them?

MR. HAMPTON: Not all of them. He has three of them.

THE COURT: I see. I don't think there is anything further to come before the court. Court is adjourned.